

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TROY DENNEY, LAURA
DENNEY, and ASHLEY DENNEY, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TROY DENNEY, JR.,

Respondent-Appellant,

and

MISSINA BUTT,

Respondent.

UNPUBLISHED

January 7, 2000

No. 217824

Ogemaw Circuit Court

Family Division

LC No. 96-010295 NA

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Respondent appeals by right from an order terminating his parental rights to three minor children under MCL 712A.19b(3)(c)(i) and (g); MSA 27.3178(598.19b)(3)(c)(i) and (g).¹ We affirm.

Respondent first argues that the trial court violated MCR 5.974(E)(1) by basing its termination decision, in part, on hearsay evidence. MCR 5.974(E)(1) indicates that a factual finding of parental unfitness resulting from “circumstances new or different from the offense that led the court to take jurisdiction” must be based on “[l]egally admissible evidence.” Respondent argues that because the “the offense that led the court to take jurisdiction” in this case was physical abuse against his daughter, only “acts of abuse, or therapy” could be proven with hearsay evidence. Respondent contends that the trial court violated this rule by basing termination, in part, on hearsay evidence of respondent’s mental instability and unfit housing environment. We review the trial court’s decision to admit the challenged

evidence for an abuse of discretion. See *In re Vasquez*, 199 Mich App 44, 50-51; 501 NW2d 231 (1993) (implicitly indicating that a trial court's decision to admit evidence in termination proceedings is reviewed for an abuse of discretion).

We disagree that the trial court abused its discretion by considering hearsay evidence of respondent's housing situation and mental state. As indicated in *In re Snyder*, 223 Mich App 85, 89-91; 566 NW2d 18 (1997), a court is bound by the rules of evidence when considering termination based on "grounds . . . unrelated to the basis on which the probate court initially established jurisdiction over the children" ² See also MCR 5.974(E)(1). However, when the "basis for the court taking jurisdiction of a child is related to the basis for seeking termination of parental rights," the court need not limit itself to legally admissible evidence when considering termination. *Snyder, supra* at 89-90. Instead, the court may consider "all relevant and material evidence, . . . even though such evidence may not be admissible at trial." MCR 5.974(F)(2); *Snyder, supra* at 89-90.

Here, the basis for the court taking jurisdiction over the children was indeed related to the basis for seeking the termination of respondent's parental rights. The court took jurisdiction over the children because of physical abuse by respondent against his daughter. The termination decision, too, was based on physical abuse, as evidenced by the court's statement that grounds for termination existed under MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i) because "the conditions [i.e., respondent's physical abuse problem] that led to the adjudication [i.e., to the taking of jurisdiction over the children] continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time." The evidence that respondent challenges – evidence of his mental problems and housing circumstances – was relevant to respondent's problem with physical abuse, since his mental problems (e.g., an inability to control anger) and housing circumstances (e.g., an overcrowded household) had been linked throughout the proceedings to respondent's tendency toward physical violence. Because the challenged evidence was relevant to respondent's tendency toward physical abuse, and because physical abuse was both (1) the basis for the court taking jurisdiction over the children, and (2) a sufficient basis for the termination of respondent's parental rights, the trial court did not abuse its discretion by considering the evidence, even if the evidence did constitute hearsay.³ *Snyder, supra* at 89-90.

Next, respondent argues that the trial court violated his right to due process of law by (1) considering hearsay evidence at the termination hearing, as discussed above; and (2) violating MCR 5.974(F)(1) by holding the termination hearing without first holding a dispositional review hearing during the preceding forty-two days. Respondent contends that the court's violation of MCR 5.974(F)(1) infringed upon his right to be notified of the potential bases for the termination of his parental rights. Respondent did not raise this due process issue in the trial court and has therefore not preserved it for appellate review. According to *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), an unpreserved, constitutional error merits reversal only if it was "a plain error that affected substantial rights."

We conclude that no interference with respondent's substantial rights occurred. First, the trial court, as discussed earlier, acted *properly* by considering hearsay evidence at the termination hearing. Second, respondent did receive notice of the termination hearing, and ongoing review hearings apprised

him of the main parenting issues about which petitioner and the court were concerned. Third, during the termination hearing, the court, concerned that respondent had not had enough time to properly respond to a recently-prepared home study report, offered respondent a second hearing in order to cross-examine the individuals who prepared the report. Accordingly, respondent received adequate notice and an adequate hearing before his parental rights were terminated, and the court's technical violation of MCR 5.974(F)(1) therefore did not violate respondent's substantial rights. See *In re Kirkwood*, 187 Mich App 542, 546; 468 NW2d 280 (1991) (violation of MCR 5.974(F)(1) does not require automatic reversal).

Finally, respondent argues that the trial court clearly erred in finding that clear and convincing evidence supported a grounds for termination under MCL 712A.19b(3); MSA 27.3178(598.19b)(3). In evaluating a decision to terminate parental rights, this Court reviews the trial court's findings of fact, as well as its ultimate disposition, for clear error. *In re JS & SM*, 231 Mich App 92, 97-98; 585 NW2d 326 (1998). Clear error exists if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 97.

As indicated earlier, the trial court's decision was based, in part, on MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i), which provides for termination if

[t]he parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . [that t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

We disagree that the trial court erred in finding that this basis for termination was supported by clear and convincing evidence. At the time the court issued the initial dispositional order, the evidence showed that respondent had struck his four-year-old daughter in the face and had stuffed dirty socks in her mouth. While respondent did attend counseling to address his problems with anger management, there were additional reports, after the initial dispositional order, that he bruised the same child and that he behaved violently toward employees of petitioner. Close to the time of the termination hearing, there were reports that respondent abused alcohol, that he became violent when drinking, and that he spanked his wife's children. There was additional, ongoing evidence that respondent suffered from mental problems and domestic instability, both of which could exacerbate respondent's violent tendencies. Accordingly, we do not have a definite and firm conviction that the trial court erred in concluding that respondent posed a physical danger to his children. Moreover, because respondent failed to show that termination of his parental rights was clearly not in the children's best interests, the court properly ordered the rights terminated. MCL 712A.19b(5); MSA 27.3178(598.19b)(5).

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gibbs
/s/ Patrick M. Meter

¹ MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i) provides for termination if

[t]he parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . [that t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g) provides for termination if

[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

² Although it is not a crucial distinction for purposes of this appeal, we note that the MCR 5.974(E) requirement of legally admissible evidence is applicable only to the court's factual findings regarding parental unfitness. The court is not limited to legally admissible evidence when deciding whether termination is "clearly not in the best interest of the child." See MCR 5.974(E)(2).

³ The court cited MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g), as well as MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i), as a basis for its termination decision. We need not address whether the court improperly considered hearsay evidence in establishing the (3)(g) basis, however, because termination was properly and independently warranted under (3)(c)(i). See MCR 5.974(F)(3) (termination justified as long as one grounds under MCL 712A.19b(3); MSA 27.3178(598.19b)(3) has been established).